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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-50

EMMETT HENDERSON and DORIS COLLINS,
Petitioners,

v.

JOYCE ST. HILAIRE MOYE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The petitioners Emmett Henderson and Doris Collins respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at —F. 2d — (8th Cir. 1974), is attached hereto as Appendix A.

The opinion of the District Court, reported at 364 F. Supp. 1286 (E.D. Ark. 1973), is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 8, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether admiralty jurisdiction properly extends to a tort which occurred on navigable waters but involved a single pleasure boat and had no relationship to maritime service, commerce or navigation.

STATEMENT OF THE CASE

This is a personal injury action which arose from a pleasure motorboat accident occurring in central Arkansas on the navigable Arkansas River. A purely social boating party of six was on a pleasure outing on the river. Activities included racing another motorboat and engaging in horseplay by throwing a hat into the river and retrieving it. Respondent Joyce Moye was a guest in the boat which was owned by Petitioner Emmett Henderson's father. Respondent was thrown from her perch on the rear deck of the boat when Petitioner Doris Collins suddenly threw the boat into reverse gear because another passenger shouted for her to stop the boat so that someone could water ski. Respondent received injuries to her right leg from the boat propeller. The evidence indicated that the entire boating party had been drinking beer or Cold Duck wine. Invoking admiralty jurisdiction under 28 U.S.C. § 1333(1), Respondent sued Petitioners in the Eastern District of Arkansas, Western Division.

Denying Petitioners' motion to dismiss for lack of admiralty jurisdiction, the District Judge assumed jurisdiction of the case in admiralty on the ground that federal admiralty jurisdiction extends to motorboat accidents on navigable waters in Arkansas. Sitting in admiralty without a jury, the Court entered judgment for $84,000 in favor of Respondent, and found Respondent 25 per cent at fault within the purview of the comparative negligence rule applied in admiralty.

The Eighth Circuit Court of Appeals affirmed the judgment of the District Court holding that admiralty jurisdiction obtained in an action arising from the operation of a boat on navigable waters, "no matter what its size or activity." Appendix, p. A-11, *infra.*

This petition follows the decision rendered by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. Decisions in the Different Circuits Subsequent to EXECUTIVE JET AVIATION, INC. v. CITY OF CLEVELAND, 409 U.S. 249 (1972) Have Been Inconsistent on the Question of Admiralty Jurisdiction in Tort Actions Involving Pleasure Boats and Having No Relationship to Maritime Service, Navigation, or Commerce. The Frequency of Pleasure Boat Accidents Demands That This Court Rule on the Question.

There were 5322 boating accidents reported in the United States in 1973 involving some 6738 vessels. 1754 persons were killed in those accidents and the property damage totaled $11,376,600.[1] This number of pleasure boat accidents indicates the potential for a large number of lawsuits filed in tort actions. Decisions in the various Circuits subsequent to the *Executive Jet* decision indicate that there is great confusion concerning the law to be applied in pleasure boat tort actions. Both courts and litigants would be saved time and expense if this Court would rule in the instant case on the applicability of admiralty law to a tort accruing on navigable water but involving a pleasure boat and having no relationship to maritime service, navigation, or commerce.

The confusion fomented by the *Executive Jet* holding is clearly indicated by different rulings as to whether that case applies only to aviation actions[2], and as to whether admiralty has

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[1] U. S. Coast Guard. *Boating Statistics* (1973).

[2] In *In Re Motor Ship Pacific Carrier*, 489 F. 2d 152 (5th Cir. 1974), the Fifth Circuit held in dictum at 155 that the *Executive Jet* holding was confined to aircraft. Yet in *Crosson v. Vance*, 484 F. 2d 840 (4th Cir. 1973), the Fourth Circuit extended *Executive Jet* beyond aviation torts by applying it to a water skiing accident. District Court cases holding that *Executive Jet* is confined to aviation cases include *Watson v. D/S/A Idaho*, 359 F. Supp. 496 (E.D. Pa. 1973) and *Maryland v. Amerada Hess Corp.*, 356 F. Supp. 975 (D. Md. 1973).

jurisdiction in tort actions involving pleasure boats, i.e., whether the mere involvement of a vessel constitutes a "traditional maritime activity" within the meaning of that decision [3]

The Fourth Circuit is in clear conflict with the Fifth and Eighth Circuits. In *Crosson v. Vance*, 484 F. 2d 840 (4th Cir. 1973), the Fourth Circuit found no admiralty jurisdiction in an action involving a water skier and pleasure boat on a navigable tributary of the Chesapeake Bay. The Fourth Circuit relied on this Court's rejection of the strict locality test as applied in *King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963), a water skier accident case, which this Court criticized in Footnote 5 of *Executive Jet*.

On the other hand, the Fifth Circuit, in *Kelly v. Smith*, 484 F. 2d 520 (5th Cir. 1973), *cert. denied*, — U.S. — (1974), ruled that admiralty has jurisdiction in a tort action involving gunshot wounds incurred in a boat in a navigable chute of the Mississippi River from a rifle on shore, even though the vessel was a non-commercial 15-foot outboard motorboat occupied by a party of game poachers.

Of course, in the instant case the Eighth Circuit has ruled that admiralty has jurisdiction over a pleasure boat accident occurring on the navigable waters of the Arkansas River regardless of the vessel's size or activity.

We submit that the cases are indistinguishable insofar as the "relationship of the wrong to traditional maritime activity" is concerned. Had the Respondent in the case at bar been injured

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[3] Citing *Executive Jet* as authority, the court in *Adams v. Montana Power Co*, 354 F. Supp. 1111 (D. Mont. 1973) held that admiralty had no jurisdiction over a small boat accident on a lake that was formed from a navigable river. Yet in *Luna v. Star of India*, 356 F. Supp. 59 (D.C. Cal. 1973) and in *Oppen v. Aetna Insurance Co.*, 485 F. 2d 252 (9th Cir. 1973), admiralty jurisdiction was upheld on the grounds that involvement of a vessel constitutes a traditional maritime activity.

by the boat's propeller while skiing, there would have been no admiralty jurisdiction over her cause of action by the *Crosson* rationale. We urge this Court to recognize the speciousness of attempting to distinguish these conflicting decisions on the ground that in one case the plaintiff was a water skier. The tortious conduct in each instance involved a single pleasure boat and had no relationship to a traditional maritime activity.

We submit the instant case presents this Court with a unique opportunity to consider this question. The fact situation is a model: a single pleasure boat in navigable waters, a single injury, no involvement with maritime commerce. Against this background, this Court can render a decision eliminating considerable confusion in the Federal Courts.

2. **The District Court and the Court of Appeals Failed to Follow the Rule That Tort Jurisdiction in Admiralty Should Not Be Determined Solely by Whether the Wrong Occurred on Navigable Water, and Thereby Failed to Apply This Court's Holding in EXECUTIVE JET.**

In the *Executive Jet* decision, this Court noted the long history of recognition of the difficulties in applying the strict locality test and pointed out that it has never held that a strict locality test is the sole test for jurisdiction of admiralty in tort actions. That decision pointed out the exceptions to the rule adopted legislatively and judicially. This Court held that "reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

In *Executive Jet*, this Court described maritime activity. 409 U.S. 249 at 269. The activities of the Respondent in the instant case bear no significant relationship to such traditional maritime activity. The historical justification for federal admiralty jurisdiction is clearly lacking.

As pointed out in the *Executive Jet* opinion, the American Law Institute has proposed the requirement of a maritime relationship as well as a maritime locality for tort jurisdiction in admiralty. This Court quoted the ALI's recommendation that "the federal courts should not be burdened with every case of an injured swimmer." Insofar as a maritime relationship is concerned, the Respondent's injuries do not differ in any respect from those of an injured swimmer, nor from those of the injured water skier in *King v. Testerman, supra,* criticized by this Court in *Executive Jet.*[4]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted

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[4] 409 U.S. 249 at 255-256, wherein this Court rejected the mechanical application of the strict locality rule in the absence of any connection between the wrong and traditional forms of maritime commerce and navigation.

Certificate of Service

I hereby certify that on this 1st day of August, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Henry Woods, Esq., McMath, Leatherman & Woods, 711 West Third Street, Little Rock, Arkansas 72201, counsel for the Respondent.

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 73-1871

Joyce St. Hilaire Moye,
Appellee,

v.

Emmett Henderson and Doris Collins,
Appellants.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: March 14, 1974

Filed: May 8, 1974

Before Van Oosterhout, Senior Circuit Judge, Lay and Ross, Circuit Judges.

Van Oosterhaut, Senior Circuit Judge

This is an action in admiralty brought by Joyce St. Hilaire Moye against Emmett Henderson, Basil Henderson, Doris Collins, and Bill Hobson seeking damages arising out of a boating accident which took place on the Arkansas River, a navigable stream, on June 6, 1971. The plaintiff suffered serious and permanent injuries, for which she seeks compensation and punitive damages. Jurisdiction is based on 28 U.S.C. § 1333 (1). A pre-trial motion to dismiss based on lack of admiralty jurisdiction was overruled. After trial to the court, Judge Henley presiding, and pursuant to a Memorandum Opinion reported at 364 F.Supp. 1286 (E.D. Ark. 1973), the plaintiff

was awarded a judgment of $84,000 against Emmett Henderson and Doris Collins. Those defendants appeal from that judgment.

Facts

Shortly before the accident here involved, Basil Henderson purchased an eighteen-foot motorboat powered by a 225 horsepower inboard engine. On June 6, 1971, he loaned the boat to his son, Emmett Henderson, for a pleasure outing on the Arkansas River. In the early afternoon the boating party met at a launching ramp near North Little Rock. Included were Emmett Henderson, Pat Henderson, Bill Hobson, Doris Collins, Carolyn McRae, and the plaintiff. The party cruised on the river for some time, with some intoxicants being consumed. Henderson allowed Hobson to operate the craft for a period, during which Doris Collins asked Hobson to be allowed to drive. She falsely represented to Hobson her experience in operating boats of this size and type. Mrs. Collins was feeling the effects of the intoxicants, and Carolyn McRae objected to allowing her to take the controls of the boat. Nevertheless, Hobson allowed her to drive after first securing the consent of Henderson, the master of the boat.

In the meantime, the plaintiff and Pat Henderson had assumed a perch atop the rear deck of the boat, with their feet on the rear seat. The plaintiff was holding a glass of wine. While the boat was traveling about 25 miles per hour, Pat Henderson shouted to Mrs. Collins three times, the last rather forcefully, to stop the boat so that someone could water ski. Mrs. Collins then pulled the combination gearshift-throttle lever backward through the neutral position into reverse gear. The boat stopped suddenly and tilted violently, throwing Henderson and the plaintiff into the water. The plaintiff was struck in the leg by the propeller, receiving serious and permanent injuries.[1]

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[1] A more complete and detailed statement of facts may be found in Judge Henley's opinion, 364 F. Supp. at 1289-91.

Proceedings Below

Suit was filed in federal court under its admiralty jurisdiction, the Arkansas River being a navigable stream. Named as defendants were Emmett Henderson, Basil Henderson, Bill Hobson, and Doris Collins. All of the defendants joined in a motion to dismiss the complaint on the ground that the court was without jurisdiction because admiralty did not extend to accidents involving small pleasure craft engaged in non-commercial navigation. The motion was overruled, Judge Henley holding in an unreported opinion that the case was clearly within the court's admiralty jurisdiction because the accident happened on navigable waters and "directly resulted from the operation of a boat which is certainly a traditional maritime activity." Judge Henley felt that admiralty applied regardless of the size of craft or the type of activity in which the boat was being operated.

After trial, Judge Henley found that Basil Henderson and Bill Hobson were free of negligence and absolved them of liability. 364 F.Supp. at 1291-92. Such deliberation is not challenged on this appeal. However, he found that Doris Collins and Emmett Henderson were each guilty of negligence proximately causing the plaintiff's injuries. *Id.* The court determined that $112,000 would be fair and reasonable compensation for the plaintiff's injuries, but reduced this amount by 25% because of her own negligence in sitting on the rear deck instead of the seat. *Id.* at 1292, 1296. Judgment was thus entered against Emmett Henderson and Doris Collins for $84,000.

Those defendants appeal from the judgment, urging as grounds for reversal that the trial court erred in the following respects:

> 1. In holding that admiralty jurisdiction was established.

2. In determining that federal law controlled and refusing to apply and enforce the law of Arkansas.

3. In failing to hold that the plaintiff's negligence was the sole proximate cause of her injuries.

We reject such contentions and affirm the judgment for the reasons hereinafter stated.

Admiralty Jurisdiction

The judicial power of the United States extends "to all Cases of admiralty and maritime Jurisdiction; . . ." U.S. Constitution, Art. III, § 2. Congress has conferred original jurisdiction on the district courts of "[a]ny civil case of admiralty or maritime jurisdiction, . . ." through 28 U.S.C. § 1333 (1). Whether the district court had jurisdiction over this case depends on whether the law of admiralty extends to the operation of small pleasure craft engaged in non-commercial navigation on navigable waters. The defendants contend on appeal that the admiralty jurisdiction of the federal courts does not extend this far. Thus, they reason, Judge Henley erred in holding that admiralty jurisdiction was present in this case, and the federal court was without jurisdiction, there being no diversity of citizenship among the parties.

The federal courts for many years exercised admiralty jurisdiction over torts governed only by the standard that the tort must have occurred on navigable waters. This standard was set down in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865): "The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." This "locality test" was often re-

iterated by the federal courts. *See, e.g., Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971) (note list of cases in n.2); *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 476 (1922); *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758, 761 (3d Cir. 1963). *See also* 7A J. Moore, Federal Practice, ¶.325 [3] (1972).

However, over the years a number of courts questioned whether the maritime locality of a tort is alone sufficient to invoke the admiralty jurisdiction of the federal courts. Several lower courts had by 1972 held that a tort, in addition to having a maritime locality, must involve a significant relationship to maritime navigation and commerce in order to invoke admiralty jurisdiction. *See Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121, 1127 (5th Cir. 1972); *Chapman v. City of Grosse Point Farms*, 385 F.2d 962, 966 (6th Cir. 1967); *Smith v. Guerrant*, 290 F. Supp. 111, 114-15 (S.D. Tex. 1968); *McGuire v. City of New York*, 192 F.Supp. 866, 868 (S.D.N.Y. 1961). Finally, in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), the Supreme Court was squarely faced with this question. In that case the plaintiff's airplane lost its power while taking off from the defendant's airport after ingesting seagulls into its engines, and crashed into Lake Erie, a navigable body of water. After discussing the history of the locality test, Justice Stewart summarized as follows:

> [T]here has existed over the years a judicial, legislative and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often the more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test. *Id.* at 261.

Finding that a crash of land-based aircraft while operating between two points of land had little to do with the focus or

purpose of the law of admiralty, the Court held that maritime locality alone is no longer sufficient to sustain admiralty jurisdiction in aviation accidents. Rather, the wrong must "bear a significant relationship to traditional maritime activity." *Id.* at 268. Such a maritime nexus is not present in the crash into navigable waters of a land-based aircraft operating between two points in the continental United States. *Id.* at 274.

The strict locality test for admiralty has thus been extensively altered. An accident must now involve a traditional maritime activity to sustain admiralty jurisdiction. Thus, the question of whether admiralty jurisdiction existed in the instant case depends on whether the accident arose out of "traditional maritime activity."

The defendants rely on *Executive Jet* to support their contention that this case does not fall within the admiralty jurisdiction of the federal courts, even though the accident occurred on navigable waters. They contend that the operation of small pleasure craft engaged in non-commercial navigation does not constitute a "traditional maritime activity." Rather, they would limit that term to commercial endeavors. In addition, they rely on policy grounds for leaving disputes of this type to state courts, which are competent to handle these essentially local cases, thus freeing the federal courts from the burden of trying such cases.

Several cases have interpreted *Executive Jet* and its effect on the admiralty jurisdiction of the federal courts. In *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), a water skier brought suit against the operator of the towing motor boat for injuries suffered when he ran into shoal waters on a navigable tributary of Chesapeake Bay. Judge Haynsworth explained the historical basis of admiralty jurisdiction.

> The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping

> industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states. The operation of small pleasure craft on inland waters which happen to be navigable has no more apparent relation to that kind of concern than the operation of the same kind of craft on artificial inland lakes which are not navigable waters.
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> * * *
>
> [W]e can perceive no apparent federal interest in providing a forum or a uniform body of law for the adjudication of claims growing solely out of the operation of pleasure craft. *Id.* at 840, 841.

He then concluded that *Executive Jet* had negated the exercise of admiralty jurisdiction in cases involving water skiers, because the Court had cited a case involving a water skier as an example of a case involving no connection with traditional maritime activity. *See* 409 U.S. at 255-56 and n. 5. However, Judge Haynsworth did not go so far as to hold that admiralty would never extend to non-commercial enterprises. "[W]e need not speculate whether the Supreme Court's opinion in *Executive Jet Aviation* would foreclose resort to admiralty in any case involving the operation of small pleasure craft, . . ." *Id.* at 842.

In *Adams v. Montana Power Co.*, 354 F.Supp. 1111 (D. Mont. 1973), admiralty law was held not to apply to the activities of boaters, water skiers, and fishermen on the Missouri River. However, at that point, the river had been dammed, forming a non-navigable lake upon which there was no "traditional maritime activity," which that court defined as relating to the needs of commerce. *Id.* at 1112. In *Rubin v. Power Authority*, 356 F.Supp. 1169 (W.D.N.Y. 1973), divers were drowned in the water intakes of the defendant. Admiralty was

held not to apply, on the ground that the failure of the defendant to post warning signs did not involve the requisite maritime nexus to justify admiralty jurisdiction. *Id.* at 1171. However, the court there distinguished cases involving the operation of vessels. *Id.* n. 1.

Other cases interpreting *Executive Jet* have limited its holding to narrower grounds. In *Maryland v. Amerada Hess Corp.*, 356 F.Supp. 975, 976-77 (D. Md. 1973), the court stated that the Supreme Court had not rejected the locality test in all admiralty cases, but only for claims arising out of airplane accidents, which are "perverse" or "casuistic border line situation[s]." A close reading of the *Executive Jet* decision would support an interpretation limiting its holding to situations involving aircraft. Justice Stewart extensively discussed the differences between aircraft and waterborne vessels, 409 U.S. at 261-72, and that difference was the essential basis for the Court's holding. Justice Stewart explicitly limited the rejection of the locality test to aviation tort cases. *Id.* at 274.[2]

Other cases interpreting *Executive Jet* have held that admiralty certainly extends to the operation of waterborne vessels as a traditional maritime activity. In *Oppen v. Aetna Ins. Co.*,

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[2] Justice Stewart even limited the holding to "flights by land-based aircraft between points within the continental United States." 409 U.S. at 274. He specifically rejected the notion that the Court was holding that an aviation tort could *never* bear a sufficient relationship to traditional maritime activity to come within admiralty. He recognized that an aircraft flying over international waters between foreign countries would be performing a function previously performed by waterborne vessels. *Id.* at 271; *see id.* at 264. Following that reasoning, a helicopter which crashed into the Gulf of Mexico while performing the functions of a crewboat was held to present a sufficient nexus to traditional maritime activity to justify the exercise of admiralty jurisdiction. *Higgenbotham v. Mobil Oil Corp.*, 357 F.Supp. 1164, 1167 (W.D. La. 1973). In accord was *Hark v. Antilles Airboats, Inc.*, 355 F.Supp. 683, 687 (D.V.I. 1973), where the court held admiralty jurisdiction extended to accidents arising from flights by seaplanes over international waters.

485 F.2d 252 (9th Cir. 1973), owners of private pleasure boats sustained damage from an oil spill in the Santa Barbara Channel. The Ninth Circuit held that damages for physical injury to maritime vessels and interference with their right of navigation presented a significant relationship to traditional maritime activity so as to sustain admiralty jurisdiction. *Id.* at 257. In *Luna v. Star of India*, 356 F. Supp. 59 (S.D. Cal. 1973), the involvement of a vessel was considered alone sufficient to invoke admiralty jurisdiction. An accident occurring on an historical merchant vessel used as a dockside museum was held to present a sufficient nexus to traditional maritime activity. *Id.* at 66.

More support for holding that the operation of vessels, including pleasure craft, comes within admiralty jurisdiction is the fact that the Supreme Court itself has previously assumed the existence of admiralty jurisdiction in a number of cases involving the operation of pleasure craft, though it did not discuss the problem directly. *Levinson v. Deupree*, 345 U.S. 648 (1953); *Coryell v. Phipps*, 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941). See *Crosson, supra*, at 842; *cf. Petition of Porter*, 272 F. Supp. 282, 284 (S.D.Tex. 1967). The holding in *Executive Jet*, limited on its face to aviation accidents, did not overrule these cases.

Perhaps the most persuasive case interpreting *Executive Jet* is *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The plaintiffs there sustained personal injuries aboard their small outboard boat when fired upon by the defendants from shore. While the fact that the injury was received on navigable waters in a boat was considered significant, the Fifth Circuit indicated other factors must be considered to determine if a substantial maritime relationship existed. These factors included "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law." *Id.* at 525.

The court found a sufficient maritime nexus in the firing at a vessel on a major commercial stream. "Admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters." *Id.* at 526. In addition, the federal interest in protecting maritime commerce and navigation on navigable waters was considered to be compelling toward admiralty jurisdiction. *Id.*

Such reasoning is quite persuasive and should be accepted to sustain the exercise of admiralty jurisdiction in the instant case. The use of a waterborne vessel on navigable waters presents a case falling appropriately within the historical scope and design of the law of admiralty. "That law deals with navigational rules —rules that govern the manner and direction those vessels may rightly move upon the waters." *Executive Jet, supra,* at 270. Even more compelling is the federal interest in protecting navigation and commerce on navigable waters. The navigation of waterborne vessels on those waters, even if not directly engaged in commerce themselves, presents a potential danger to the operation of vessels which are engaged in commerce on those waters. This is the very basis of laws requiring vessels used on navigable waters to meet certain safety and operational standards. *See, e.g.,* Motorboat Act of 1940, 46 U.S.C. § 526 (as amended, 1958). The law of admiralty must surely cover the operation of vessels which present potential dangers to commerce on navigable waters.

Nor may it be contended that the term "vessel" in admiralty law is limited to ships or vessels engaged in commerce. In 1 U.S.C. § 3 the term is defined as follows: "The word 'vessel' includes every description of watercraft or other artificial conveyance used, or capable of being used, as a means of transportation on water." 46 U.S.C. §713 provides in part: "[T]he term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake, or river. . . ." These definitions are surely broad enough to encompass the type of boat here involved.

In addition to the holding that the law of admiralty extends to the operation of all waterborne vessels on navigable waters, admiralty jurisdiction may be applicable under express statutory provision. The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, provides in part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." The purpose of this legislation was to extend the law of admiralty to encompass claims arising out of a relationship to maritime activities, regardless of the locality of the tort. *Executive Jet, supra,* at 260. However, the language of the statute is written in the broadest terms to cover all damage "caused by a vessel on navigable water." All that is required for the Act to come into involvement is injury caused by a vessel on navigable waters. *See Gebhard v. S.S. Hawaiian Legislator,* 425 F.2d 1303, 1307 (9th Cir. 1970). As mentioned previously, statutory definitions of vessel do not limit the term to commercial boats, but cover any waterborne transportation device.

We affirm Judge Henley's holding that the operation of a boat on Navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend. The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, provides an additional basis for the exercise of admiralty jurisdiction in this case.

Applicable Law

The defendants' second contention on appeal is that even if the district court properly exercised admiralty jurisdiction in this case, it should have applied and enforced Arkansas law. That state has enacted a boat guest statute. Ark. Stat. Ann. § 21-235 (1968). This legislation, patterned after automobile

guest statutes, forbids a social guest on a motorboat from recovering damages against the owner or operator of the boat unless it was "wilfully and wantonly operated in disregard of the rights of others." *Id.* Application of this statute would have barred any recovery by the plaintiff, for Judge Henley found that neither Doris Collins nor Emmett Henderson were guilty of wilful or wanton operation of the vessel without regard to the rights of others. 364 F.Supp. at 1293.

A federal court sitting in admiralty does not sit as a diversity court; therefore, this is not a case "where state substantive law *must* be ascertained and applied." *Spiller v. Lowe*, 466 F.2d 903, 907 & 908 n. 6 (8th Cir. 1972). Rather, admiralty suits are governed by federal substantive procedural law. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953); *Branch v. Schumann*, 445 F.2d 175, 178, (5th Cir. 1971). However, a federal court sitting in admiralty need not "invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action . . . *Just v. Chambers*, 312 U.S. 383, 387-88 (1941). *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). Thus, admiralty courts may apply state law by express or implied reference or when the federal law of admiralty is incomplete. *Baggett v. Richardson*, 473 F.2d 863, 864 (5th Cir. 1973). *See The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959). The Supreme Court has sustained the application of state laws which broaden the scope of liability beyond the general maritime standard. *See Hess v. United States*, 361 U.S. 314 (1960); *Just, supra. See also In Re M/T Alva Cape*, 405 F.2d 962, 969-70 (2d Cir. 1969).

However, state law may not be applied by a federal court if it would defeat or narrow any substantial admiralty rights

of recovery, either as created by federal legislation or as defined by interpretive decisions of the federal courts. *Pope & Talbot, supra,* at 410; *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243-46 (1942); *Bagrowski v. American Export Isbrandtsen Lines, Inc.,* 440 F.2d 502, 506 (7th Cir. 1971); *Alva Cape, supra,* at 970. In addition, state law may not be applied to "contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations." *J. Ray McDermot & Co., Inc. v. Vessel Morning Star,* 457 F.2d 815, 818 (5th Cir.) (en banc), *cert. denied,* 409 U.S. 948 (1972). *See Just, supra,* at 389-90; *Jensen, supra,* at 216. Even if state law does not contravene an established principle of admiralty, it may be deemed pre-empted if it is in direct contravention of the uniformity of the admiralty law in some crucial respect. *Alva Cape, supra,* at 970. *See Branch, supra,* at 178.

Application of the Arkansas statute herein involved would not be in accordance with these principles. The standards of maritime law measure the rights and liabilities arising from conduct occurring on vessels on navigable waters. *Kermarec, supra,* at 628. A tort action against the master of a vessel therefore is an action lying in federal maritime law, and negligence in the operation of a boat creates a federal right of recovery to all who are injured by that negligence. *See Pope & Talbot, supra,* at 409; *Blevens v. Sfetku,* 66 Cal. Rptr. 486, 491 (Cal. App. 1968). The Arkansas statute limiting recovery for social guests on boats would defeat that federal right of recovery, and thus may not be applied in an admiralty court. In addition, Arkansas is the only state with a boat guest statute currently in force.[3] Application of this local rule would be

[3] California also had a boat guest statute. However, the Court of Appeal of that state refused to apply it to defeat a federal right of recovery for negligent injury by a boat operator while in navigable waters. See *Blevens v. Sfetku,* 66 Cal. Rptr. 486, 491 (Cal. App.

disruptive of the uniformity of the admiralty law, for only within the state of Arkansas would such a rule be operative to defeat the rights of persons injured by the negligence of boat operators on navigable waters. Such a local variation is not warranted in light of the need for a uniform and harmonious maritime law.

In addition, the Arkansas statute may well be in direct contravention of a pre-emptive federal statute. The Motorboat Act of 1940, 46 U.S.C. § 526, provided for the federal regulation of all motorized vessels used on navigable waters. Section 526(1), as amended in 1958,[4] provided in pertinent part,

> No person shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person. To "operate" means to navigate or otherwise use a motorboat or vessel.

A violation of this standard of conduct was a misdemeanor punishable by a fine of up to $2000 and/or imprisonment for one year under § 526(m) of the Act.[5]

Judge Henley held that the legislation providing penalties for the negligent operation of motorboats did not purport to "deal with private remedies for injuries arising out of motor boat accidents occurring on navigable waters. . . ." 364 F. Supp. at 1294. According to this reasoning, state civil remedies would not be in direct conflict with the above federal standard of care

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1968). That statute and all other guest statutes in California have been declared unconstitutional as a violation of equal protection under the 14th amendment, and thus are no longer operative. *Brown v. Merlo,* 106 Cal. Rptr. 388, 506 P.2d 212 (Cal. 1973).

[4] This section, among others, was repealed effective August 10, 1971. Act of August 10, 1971, Pub. L. No. 92-75, § 41(a)(1), 85 Stat. 228. However, it was in effect at the time of the accident here involved.

[5] Repealed, Act of August 10, 1971, Pub. L. No. 92-75, § 41(a)(1), 85 Stat. 228.

so as to be specifically pre-empted. Support for this holding may be found in *Godinez v. Jones*, 179 F.Supp. 135, 139 (D. P.R. 1959).

However, we do not accept that conclusion. The federal act established a standard of conduct in 46 U.S.C. § 526(1) prohibiting negligence or carelessness in the operation of a boat, and the state statute in question prevented the application of that standard in civil actions. The state statute thus conflicts with the federal standard and must necessarily fall. The Court of Appeal for California, interpreting a similar statute in that state, considered the state statute to conflict with the federal standard of conduct, and held that the latter must therefore pre-empt the former. *See Blevens, supra*, at 491. In addition, Judge Henley held that though the statutes did not conflict directly, the Arkansas statute undermined the uniformity of the federal maritime law and refused to apply and enforce it in the instant case. 364 F.Supp. at 1294. That result is in accordance with our own conclusion that application of the Arkansas statute would be disruptive of the uniformity of the admiralty law.

Federal legislation in force at the time of the accident may therefore be considered to have pre-empted the field, and the contradictory state statute could not have been enforced by the admiralty court. In addition, the state statute was destructive of the uniformity of federal maritime law, and therefore could not be enforced by the admiralty court even if the two acts were not directly contradictory. The district court did not err in refusing to enforce the Arkansas boat guest statute.

Apportionment of Negligence

The defendants third contention on appeal is that the district court erred in failing to hold that the sole proximate cause of the plaintiff's injury was her own negligence in sitting atop the

rear deck of the boat rather than in the seat. It is responsibility of the trial judge as fact-finder to assess the facts and apportion negligence among the parties as he deems proper under the doctrine of comparative negligence, which is applied in admiralty. *See Pope & Talbot, supra,* at 408-09; *American President Lines, Ltd. v. Welch,* 377 F.2d 501, 504 (9th Cir.), *cert. denied,* 389 U.S. 940 (1967). Judge Henley apportioned 25% of the total negligence to the plaintiff and reduced her judgment accordingly. Such a finding may be reversed in an appellate court only if it is clearly erroneous. Fed R. Civ. P. 52(a); *Guzman v. Pichirilo,* 369 U.S. 698, 702 (1962); *McAllister v. United States,* 348 U.S. 19, 20-21 (1954). The evidence presented in this case amply supports Judge Henley's apportionment, and that finding should not be set aside on appeal.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

Joyce St. Hilaire Moye, Plaintiff,

v.

Emmett Henderson et al., Defendants.

No. LR-73-C-51.

United States District Court
E. D. Arkansas, W. D.

Oct. 17, 1973.

MEMORANDUM OPINION

Henley, Chief Judge.

This is a suit in admiralty brought by Joyce St. Hilaire Moye against Emmett Henderson, Basil Henderson, Doris Collins, and Bill Hobson; the suit arises out of a boating accident that took place on the afternoon of June 6, 1971, on the Arkansas River, an admittedly navigable stream, near the City of Little Rock, Arkansas. As a result of the accident plaintiff sustained serious and permanent personal injuries, and in this action she seeks compensation for those injuries. She also seeks punitive damages. Jurisdiction is predicated upon 28 U.S.C.A. § 1333(1).[1]

The complaint alleges in substance that plaintiff's injuries were proximately caused by negligence on the part of all of the defendants, and that all of them are liable for the damages that

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[1] There is no diversity of citizenship between the parties, all being citizens of Arkansas.

plaintiff sustained; it is further contended that the alleged negligence of the defendant, Doris Collins, who was actually operating the boat at the time of the accident, is imputed to Emmett Henderson as "master" of the boat and to his father, Basil Henderson, as owner of the boat.

The complaint was filed on February 20, 1973. On March 6, 1973, defendants, Basil Henderson, Doris Collins, and Bill Hobson, filed their answer denying liability and also filed a cross claim against Emmett Henderson seeking indemnity or contribution from him should they or any of them be held liable to the plaintiff.

On March 28, 1973, Emmett Henderson filed a motion to dismiss the complaint on the ground that the case was not within the admiralty jurisdiction of the Court. The other defendants later joined in that motion. On June 8, 1973, the Court filed a Memorandum and Order overruling the motion, and thereafter, Emmett Henderson filed his separate answer denying liability and praying that the complaint be dismissed.

On the merits, the defendants deny that plaintiff's injuries were proximately caused by negligence on the part of any of the defendants, and they take issue with plaintiff on the issue of damages. Affirmatively, they contend that plaintiff was guilty of contributory negligence, and that she voluntarily assumed the risk of injury by sitting on the rear deck of the boat rather than in the rear seat.

The defendants also contend that in any event plaintiff cannot recover because she was a guest in the boat, and that recovery is precluded by Section 15 of Arkansas Act 453 of 1959, Ark. Stats. Ann., § 21-235, which provides that no person transported or riding as a guest on Arkansas waters shall have a cause of action against the owner or operator of such vessel for damages on account of any injury, death, or loss occasioned by the

operation of such vessel "unless such vessel was wilfully and wantonly operated in disregard of the rights of others."[2]

The case has been tried to the Court, and this opinion incorporates the Court's findings of fact and conclusions of law.

Basil Henderson, one of the defendants herein, is the father of the defendant, Emmett Henderson. Pat Henderson is a nephew of Basil Henderson and a first cousin of Emmett Henderson. Defendant, Bill Hobson, is a close friend of the Henderson family.

At the time of the accident plaintiff's name was Joyce St. Hilaire; she was a divorcee who has remarried since the accident. She and the defendant, Doris Collins, were acquainted. Another party to be mentioned is Carolyn McRae, who was well acquainted with Pat Henderson's brother, Mike, who does not figure in the case. Doris Collins is substantially older than Emmett and Pat Henderson and Bill Hobson; however, in June, 1971, all of those individuals were adults.

Shortly prior to the date of the accident Basil Henderson had purchased an eighteen-foot motor boat powered by a 225 horsepower inboard engine. This boat had a front seat and a rear seat; immediately behind the rear seat was a space referred to as a "deck". The boat's rudder and propeller were at the extreme rear of the boat and were underneath this deck. The deck was sufficiently large for rear seat passengers to sit upon it.

In the front of the boat there were a dashboard and a steering wheel, which was located on the right side of the vessel; on the right side of the vessel and at the right hand of the operator there was a single lever which controlled both gears and throttle. There were three gear positions, neutral, forward, and reverse.

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[2] That provision is essentially the same as that which is applied to guest riders in motor vehicles by the Arkansas Automobile Guest Statute, Ark.Stats.Ann. § 75-913.

On June 6, 1971, Basil Henderson turned the boat over to Emmett Henderson for use on a pleasure cruise on the Arkansas River. The cruise party consisted of Emmett Henderson, Pat Henderson, Bill Hobson, Doris Collins, Caro yn McRae, and plaintiff. The evidence reflects that on the n ght of June 5-6 plaintiff and Doris Collins had visited two or three nightclubs in Pulaski County, Arkansas, and had done a considerable amount of drinking; they returned to the Collins apartment about 2:00 a.m. on June 6, and accepted the invitation to join the cruise later in the day. While they may well have been suffering somewhat from their experience of the night before, there is no evidence that either one of them was intoxicated at the commencement of the voyage.

The boat was launched about 12:30 p.m. at the Burns Park launching ramp on the north side of the river. The male members of the party had one or two cases of beer in an ice chest and also had some whiskey, but there is no evidence that any whiskey was consumed prior to the accident. Plaintiff and Doris Collins brought along with them half a bottle of a type of wine known as "Cold Duck".

The boat was put into motion, and the party cruised up and down the river for some thirty to forty-five minutes, after which the boat was beached temporarily at a sandbar. During this phase of the journey, the three men were in the front seat of the boat and the three women were in the back seat.

Before stopping at the sandbar, the Henderson boat engaged in something of a race with another motor boat, and the Henderson party engaged in a degree of horseplay in that a hat would be thrown or blown into the river and then retrieved while the boat was in motion.

When the party left the sandbar, the seating arrangements were revised. There is a slight conflict as to just how the occupants of the boat were seated. While the conflict is not really

material, the Court finds from a preponderance of the evidence that when the journey was resumed, Bill Hobson was at the controls and was sitting on the right front seat; Doris Collins and Carolyn McRae were also in the front seat, with the former occupying the middle position. The back seat passengers, plaintiff, Emmett Henderson, and Pat Henderson, were not sitting in the back seat. Emmett Henderson was seated on the engine cover between the two seats. Plaintiff and Pat Henderson were sitting on the rear deck with their feet on the back seat; plaintiff was on the right-hand side of the boat, and Pat Henderson was on the left-hand side.

When the boat left the sandbar, it was headed downstream toward the series of bridges which cross the river and connect the cities of Little Rock and North Little Rock. As of that time the male members of the party had consumed a beer or two apiece, and the females had finished the Cold Duck, which involved each of them drinking two small glasses of it. The Court does not find that any of the occupants of the boat other than Doris Collins was affected by his or her consumption of alcohol to any substantial degree. As to Doris Collins, the Court finds that she was feeling and manifesting the effects of the Cold Duck to the extent that she was exilarated or somewhat "high", as it is sometimes called.

As the boat proceeded downstream, Doris Collins asked to be permitted to operate the boat, and she represented falsely that she had had experience in the operation of boats of the type involved here. In point of fact, her only experience in operating a boat involved an outboard motor boat with a sixty horsepower engine, and she had never operated that except in the company of her former husband.

Carolyn McRae objected to Mrs. Collins being permitted to operate the boat, being of the opinion that she was too much under the influence of alcohol. Bill Hobson, who was operating

the boat at the time, was not willing to permit Mrs. Collins to assume control without the consent of Emmett Henderson, but he suggested to Henderson that permission be given to Mrs. Collins to take over the wheel, and permission was granted. Mrs. Collins and Hobson changed positions, and the former took the wheel. This change of arrangement did not involve any significant alteration of the boat's speed or direction.

Mrs. Collins had no immediate problem with operating the boat, which, at the moment, involved nothing but steering it, and the accident presently to be described would in all probability not have occurred had not Pat Henderson decided that he wanted to water ski. He called on Mrs. Collins to stop the boat so that he could make his preparations and get into the water; Mrs. Collins apparently did not hear, and certainly she did not heed Henderson's first request that the boat be stopped. He repeated his request, by then a demand, in a loud and rough tone of voice, and Mrs. Collins reacted violently.

Instead of simply pulling the throttle-gear lever back into the neutral position, she pulled it completely through that position and thus threw the boat, which was moving about twenty-five miles an hour aided by the current, into reverse gear. When that happened, the bow of the craft plunged downward, and the stern of the boat came out of the water; at the same time, the boat veered to the left and very nearly capsized. Plaintiff and Pat Henderson were both thrown from the rear deck into the water. Henderson escaped injury, but plaintiff's right leg was struck near the knee by the whirling propeller, and she received a mangling injury to that limb. She sustained a compound, comminuted fracture of the right femur, and the propeller excised from her leg a large amount of muscle tissue; naturally, this injury was attended by a very serious loss of blood. The injury was serious and permanent.

Before discussing the legal issues in the case, the Court finds it convenient to state the inferences that it draws from the evi-

dence with respect to claims of negligence, contributory negligence, and assumption of risk.

The Court will say, first, that it does not find that Basil Henderson was guilty of any negligence in entrusting the boat to his son for the purpose of the cruise. Emmett Henderson, Pat Henderson, and Bill Hobson were all grown men; they were not intoxicated when Basil Henderson gave permission for the use of the boat, and he had no reason whatever to believe that the voyage would be attended by any mishap. It is alleged in the complaint that Basil Henderson negligently failed to equip that boat with any life saving apparatus, but the absence of such apparatus had nothing to do with the accident or with plaintiff's injury. So, the Court concludes that if Basil Henderson is liable in the case, his liability is purely vicarious.

This Court does not find that the defendant, Hobson, was guilty of any negligence that was a proximate cause of plaintiff's injuries. To start with, he was not the master of the boat and except in connection with his own operation of it, he owed no duty of care toward his fellow passengers. While he suggested that it would be appropriate to permit Doris Collins to operate the boat, it must be remembered that in connection with her request to be allowed to operate it she assured both Hobson and Emmett Henderson that she was an experienced operator and would know what she was doing, and there is no evidence that either of them had any reason not to believe her. If it be argued that Hobson should have intervened and resumed control of the vessel when Pat Henderson demanded that it be stopped, the answer is that this accident happened in a split second, and Mr. Hobson simply had no opportunity to resume control, assuming that he was under any obligation to do so. In view of these negative findings with respect to Hobson, the complaint as to him will be dismissed.

The Court does find from a preponderance of the evidence that Doris Collins and Emmett Henderson were guilty of negli-

gence proximately causing plaintiff's injuries. The Court also finds that plaintiff was guilty of negligence proximately causing plaintiff's injuries. The Court does not find that she "assumed the risk" of injury as that term is understood in Arkansas where "assumption of risk" is pleaded as a complete defense to a tort action. And the Court finds that the negligence of plaintiff was slight in comparison to the negligence of Doris Collins and Emmett Henderson, particularly with respect to the negligence of the former.

With respect to Doris Collins, the Court finds that she falsely represented her ability to operate the boat, that she undertook to operate it while intoxicated to some degree, and that she was guilty of negligence when she threw the vessel into reverse gear. While she says that she "panicked" when Pat Henderson shouted to her to stop the boat, that affords no excuse for her action, nor does her actual inexperience in the operation of large inboard motor boats.

As to Emmett Henderson, he was in charge of the boat and owed a duty of care to the passengers thereon. The Court does not think that Henderson can be charged with negligence because he relied on the statements of Mrs. Collins about her experience, but the Court finds that he was guilty of negligence in permitting her to operate the boat over the protest of Carolyn McRae at a time when he knew or should have known that Mrs. Collins was feeling the effect of her drinks. The Court also finds that Henderson was guilty of negligence in another respect that will be mentioned in a moment.

The Court finds that plaintiff was guilty of negligence in sitting on the rear deck rather than in the rear seat. While the Court knows from observation of many boaters that people do sit in places other than the seats designed for their accommodation, that which is customary is not necessarily safe or prudent, and the Court thinks that plaintiff failed to use ordinary care for her own safety when she elected to sit on the deck while

the boat was moving down the Arkansas River at a quite substantial rate of speed for a boat.

Counsel for the plaintiff earnestly contends that even if plaintiff was negligent in sitting on the deck, her negligence was not a proximate cause of her injury, that is to say, he argues that she would have been thrown out of the boat even if she had been sitting in the seat where she belonged. The Court does not think so, and rejects counsel's argument.

But if plaintiff was negligent in sitting on the deck, as the Court has just found that she was, Emmett Henderson was also negligent in permitting her to sit there. The Court will repeat that Henderson was in charge of the boat and had a right and duty to insist that the passengers conduct themselves in a manner consistent with their safety. He failed to do so.

While the Court has found that plaintiff's injuries were due to the concurrent negligence of Doris Collins, Emmett Henderson, and the plaintiff, the Court does not find that either Doris Collins or Emmett Henderson was guilty of any wilful or wanton operation of the vessel without regard to the rights of others, which would take Section 15 of Act 453 of 1959 out of the case, assuming that it is applicable to a suit arising out of a motor boat accident taking place on navigable waters in Arkansas. And from both a legal and a practical standpoint the question of the applicability of that statute is the most important question in the case because, if the statute is applicable, plaintiff is not entitled to recover from any of the defendants.

In approaching that question, the Court will first state that it adheres to the position taken by it in June of this year that the admiralty jurisdiction of the federal courts in Arkansas extends to motor boat accidents occurring on the navigable lakes and streams of this state.

The contention of the defendants based on Section 15 of Act 453 of 1959 has been briefed thoroughly by counsel for Basil

Henderson, Doris Collins, and Bill Hobson, and his argument has been adopted by counsel for Emmett Henderson.

Counsel do not contend that as a matter of general admiralty law a guest passenger on a boat or vessel cannot recover for personal injuries received as a result of the operation of the vessel unless the conduct of the operator exceeds mere negligence and amounts to wanton or reckless misconduct or disregard of the rights of others. Nor do counsel appear to contend that the provision in question overrides the general admiralty rule merely because it is a statutory provision rather than a rule of Arkansas common law.

As the Court construes it, the argument is that the Federal Boating Act of 1958 heretofore cited was, in effect, an enabling act authorizing the legislatures of the several states to regulate small boating activities on their waters whether navigable or non-navigable; that Act 453 was passed on the basis of the federal statute, and that Section 15 of that Act is a valid and binding inclusion, and that it is applicable here. The Court does not accept this argument.

The federal statute in question did a number of things. Section 3 of the Act established a uniform system of identifying by numbers small craft operating on the navigable waters of the United States. Section 6 of the Act amended Section 13 of the Motor Boat Act of 1940 so as to prohibit the negligent or reckless operation of motor boats on navigable waters and so as to require reports of certain types of motor boat accidents. Section 9 declared it to be the policy of Congress to encourage uniformity of boating laws, rules and regulations among the several states subject to reasonable exceptions arising out of local conditions. Section 13 provided that federal laws relating to motor boats and their operation should be enforced by federal law enforcement officers, and that state laws should be enforced by state and local officers. And Section 13(4), upon which defendants particularly, provided that "Nothing herein shall

interfere with, abrogate or limit the jurisdiction of any State: *Provided, however,* That the Secretary shall not approve any State system for numbering which does not fully comply with the standards set forth in section 3(c)."

The Court does not consider that the Boating Act of 1958 purported to deal with private remedies for injuries arising out of motor boat accidents occurring on navigable waters or to confer upon the states the power to alter by statute general principles of admiralty law. To construe the statute as vesting such power in the individual states would militate against the very policy of uniformity of law among the several states announced in Section 9 of the Act.

How such power would undermine the desired uniformity of law in the field of motor boat operation is illustrated by the very section of the Arkansas Act invoked by the defendants. As pointed out by counsel for plaintiff in his brief, Act 453 of 1959 is obviously based upon the Model State Boat Act of 1959, and Section 1 of the Arkansas statute, Ark. Stats.Ann., § 21-221, states that it is the public policy of this state "to promote safety for persons and property in and connected with the use, operation and equipment of vessels and *to promote uniformity of laws relating thereto.*" (Emphasis added). But, Section 15 of the Act is not a "uniform provision." No corresponding provision appears in the Model Act, and the Court agrees with counsel for plaintiff that the Arkansas Legislature simply saw fit to insert in the boating statute the "guest rider" provision which appears in the Arkansas motor vehicle code. If the Arkansas Legislature had the power under the federal statute to enact this particular provision and apply it to accidents occurring on navigable waters, it would also have had the power to so enact and apply any other peculiar rule or principle of Arkansas tort law, including, for example, the Arkansas statutory rule that contributory negligence is a complete defense in a personal injury suit if the negligence of the

plaintiff is equal to or greater than the negligence of the defendant. Ark.Stats.Ann. § 27-1730.1, and § 27-1730.2.

Had Congress intended in 1958 to vest such legislative power in the several states, it could have said so easily. The Court holds, therefore, that Section 15 of Act 453 of 1959 is not applicable to motor boat accidents, such as the one involved here, which occur on navigable lakes and streams in Arkansas.

Taking up now the claims of vicarious liability asserted by plaintiff against Emmett Henderson and Basil Henderson, the Court finds without difficulty that Emmett Henderson is responsible not only for his own negligence but also for that of Doris Collins.

Regardless of whether the nautical term "master" should be applied to Emmett Henderson or not, he was in charge of the boat and stood in the position of the owner. He permitted Mrs. Collins to operate the boat; and he had the right and duty to control her operations of the craft, and is responsible for her operational negligence.

As far as Emmett Henderson is concerned, the situation presented here does not differ in principle from that presented in the non-maritime case of Watt v. United States, E.D.Ark.1956, 123 F.Supp. 906, tried and decided by the late Judge Lemley. In that case a wife was operating her husband's car in his presence, and the Court found that her negligence was imputed to him on a simple theory of agency. The Court said (p. 915 of 123 F.Supp.):

> "While the relationship of principal and agent or of master and servant, and the existence of a right to control the driver in the operation of the vehicle are not established as a matter of law by the mere presence of the owner in the vehicle at the time of the accident, such presence creates an inference that he has the right to control and direct the driver or that the latter is his agent or servant. . . ."

In his brief counsel for Emmett Henderson cites and principally relies upon Strom v. Anderson, W.D.N.Y.1953, 114 F.Supp. 767. On the basis of that decision counsel argues that absent a showing of negligent entrustment, Emmett Henderson cannot be held liable for the negligence of Doris Collins. Apart from the fact that the Court has found that Emmett Henderson was negligent in permitting Mrs. Collins to operate the boat, the Anderson case is readily distinguishable from this one since, in that case, the owner of the boat was not on board when the accident occurred and had no control or right of control over the operation. Here, as has been seen, Emmett Henderson was aboard and in charge of the boat at the time of the accident.

As to Basil Henderson, the situation is quite different. No claim is made that the boat was unseaworthy in any respect proximately contributing to the accident. The Court has found that Basil Henderson was not negligent in turning the boat over to his son; Basil Henderson was not aboard the boat at the time of the accident, and he had nothing to do with the operation of the boat. He was simply a non-negligent bailor of the boat and is not liable for negligence in its operation.

In 80 C.J.S. Shipping § 79, it is said:

> "Generally speaking, those persons are liable for torts committed in the operation of a vessel who at the time sustain the relationship of master or principal to the person in immediate control of the vessel; where at the time of the tort the owner of the vessel is, with respect to the persons in control, merely a bailor, such persons, rather than the owner are liable."

A similar statement of principle is to be found in 70 Am. Jur.2d, Shipping, § 276. The Court will also observe that while Strom v. Anderson, supra, is no help to Emmett Henderson, it is clearly applicable to Basil Henderson.

In undertaking to hold Basil Henderson liable, counsel for plaintiff cites Coryell v. Phipps, 1943, 317 U.S. 406, 63 S.Ct.

291, 87 L.Ed. 363, and Just v. Chambers, 1941, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903. The Court considers that both of those cases are distinguishable from this one as far as liability of the owner of the boat is concerned.

From the foregoing it follows that plaintiff is entitled to recover against Doris Collins and Emmett Henderson.

At the time of the accident plaintiff was about twenty-five years of age and had a life expectancy of forty-four years. She has a high school education. Prior to joining the Army in 1966 she had been employed by a credit bureau in Chicago, Illinois. She was discharged from the Army in 1969. After her discharge she and her then husband moved to Florida where she held a number of jobs. After she and her husband were divorced, she came to Arkansas where she has relatives. She enrolled in a school for beauty operators and was nearing the end of her course of instruction when she was injured. The evidence indicates that she was making satisfactory progress in her training.

As has been said, plaintiff sustained a compound comminuted fracture of the right femur accompanied by a very substantial loss of tissue above her right knee, which tissue cannot be restored. Her injury is permanent, and she has a substantial permanent disability arising from the fact that she suffers difficulty in standing or in walking on rough or uneven surfaces. She has sustained a great deal of pain and mental anguish, and will continue to suffer at least a good deal of discomfort as a result of her injuries. In addition, her leg has been disfigured and will remain so. That disfigurement will, in all probability, deter her from engaging in certain types of recreational activities and from wearing clothing of certain types. It will also doubtless affect her emotionally. Her medical and hospital expenses down to this time amount to nearly $7,000, and she will pay or incur such expenses in the future in the amount of about $2,000.

Plaintiff has lost earnings which she would have received had she been able to work as a beautician upon completing her

course of training or in some other line of work had she failed to complete the course or had she decided to follow some other line of endeavor. Her capacity to earn money in the future has been substantially diminished due to the fact that she cannot do any work which requires her to stand on her feet; that disqualifies her from being a beauty operator, and it may be assumed that it would disqualify her from re-enlisting in the Army, where, in view of her experience, she might be expected to derive substantial earnings and substantial fringe benefits. On the other hand, the Court does not consider that plaintiff is totally disabled or totally unemployable. Assuming that she had not been injured, and ignoring the fact of her re-marriage, the Court thinks that plaintiff might reasonably be expected to have worked about thirty years.

Taking into consideration all of the elements of damage that have been mentioned, the Court finds that the gross sum of $112,000 would be fair and reasonable compensation for plaintiff's injuries and damages, past, present and future. That sum must be diminished, of course, in proportion to plaintiff's own negligence, and the Court now finds that the plaintiff's negligence contributed to her injuries to the extent of twenty-five per cent (25%). Thus, her net award of compensatory damages will be $84,000. No case for punitive damages has been made, and no such damages will be awarded.

There remain to be considered the cross-claims against Emmett Henderson. The Court's exoneration from liability of Basil Henderson and Bill Hobson renders their cross-claims moot. Emmett Henderson filed no cross-claim against Doris Collins, and the Court is of the opinion that she is not entitled to any indemnity or contribution from him. Certainly, she cannot complain because Emmett Henderson granted her own request to operate the boat, and his negligence in permitting plaintiff to ride elsewhere than in the rear seat of the boat was passive, whereas the negligence of Mrs. Collins was active.

A judgment in accordance with the foregoing will be entered.

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-50

EMMETT HENDERSON and DORIS COLLINS,
Petitioners,

v.

JOYCE ST. HILAIRE MOYE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is now reported in 496 F.2d 973 (8th Cir. 1974).

JURISDICTION

The petitioner asks this court to grant certiorari because of a conflict in the Circuits, but as pointed out *infra*, no conflict exists as to the precise question herein presented.

QUESTION PRESENTED

We take issue with the way in which petitioner frames the question in this case. Petitioner's question includes the statement that the "tort . . . had no relationship to maritime . . . navigation." This statement is not correct. The plaintiff was a passenger in a rather large and powerful pleasure boat being navigated in the main channel of the Arkansas River Navigation Project. The question is whether admiralty jurisdiction extends to the operation of such a vessel on a navigable stream.

STATEMENT OF THE CASE

Plaintiff was a guest in an 18 foot, 225 h.p. motor cruiser being operated on the Arkansas River. The boat was owned by Basil Henderson and was in the charge of his son, Emmett Henderson. Bill Hobson, also a guest, was operating the boat when he entrusted its operation to Doris Collins, another guest, with the acquiescence of Emmett Henderson. She had never operated a boat of this type, and the Court found that she was "feeling and manifesting" the effects of intoxicants. While the boat was operating at a high speed, she suddenly threw it into reverse causing it to partially capsize and throw plaintiff out of the craft into the river. Plaintiff was struck by the propeller and seriously injured.

Suit was filed in admiralty and tried to the court. The court found that defendant Doris Collins "falsely represented her ability to operate the boat, that she undertook to operate it while intoxicated to some degree, and that she was guilty of negligence when she threw the vessel into reverse gear." The court found that Emmett Henderson was "guilty of negligence in permitting her to operate the boat over the protest of Carolyn McRae at a time when he knew or should have known that Mrs. Collins was feeling the effect of her drinks." The Court of Appeals affirmed a substantial judgment in plaintiff's behalf.

ARGUMENT

I

Admiralty Jurisdiction Existed in This Case.

There are three decisions in this court in which admiralty jurisdiction was asserted over maritime torts involving pleasure craft. They are *Levinson v. Deupree*, 354 U.S. 648 (1953); *Coryell v. Phipps*, 317 U.S. 406 (1943); and *Just v. Chambers*, 312 U.S. 383 (1941). Cases in the inferior Federal Courts are legion. Some of the Circuit Court of Appeals decisions asserting admiralty jurisdiction over pleasure craft are: *In re Reading's Petition*, 217 F.2d 959 (2d Cir. 1959); *The Mistral*, 50 F.2d 947 (2d Cir. 1931); *Schoremeyer v. Barnes*, 190 F. 2d 14 (5th Cir. 1951); *Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Loc-Wood Boat & Motors, Inc. v. Rockwell*, 245 F.2d 306 (8th Cir. 1957); *Isaacson v. Jones*, 216 F.2d 599 (9th Cir. 1954). Jurisdiction has been refused, as pointed out by the Court of Appeals, in a few cases involving swimmers, water skiers, and divers. This is not such a case. Instead it involves the operation of an eighteen foot, 225 horsepower vessel in the main channel of the Arkansas River Navigation project, one of the most important commercial waterways in this country. As Judge Van Oosterhaut so aptly pointed out, "The navigation of waterborne vessels on those waters, even if not directly engaged in commerce themselves, presents a potential danger to the operation of vessels which are engaged in commerce on those waters." 496 F.2d 973, 979.

Petitioners urge that this great mass of authority was impliedly obliterated by *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), a case without any factual similarity to the instant case. A chartered plane took off from the

Cleveland Airport, which is adjacent to Lake Erie. The plane was on a flight to Portland, Maine. As it took off, the engines ingested sea gulls and the plane lost power. It turned back toward the runway, struck a portion of the airport fence and a parked truck. It then settled in Lake Erie just off the end of the runway about 300 yards from the shore. This court found that the operation of this aircraft between two points of land had little to do with the focus or purpose of the law of admiralty. 409 U.S. 249, 268. The fact that this plane ended up in Lake Erie was wholly fortuitous and completely unrelated to the tort itself. *Id.* at 267.

Neither the facts nor the rationale of this case bear relationship to the case at bar. Writing for the Eighth Circuit, Judge Van Oosterhout has put it in proper perspective:

> A close reading of the *Executive Jet* decision would support an interpretation limiting its holding to situations involving aircraft. Justice Stewart extensively discussed the differences between aircraft and waterborne vessels, 409 U.S. at 261-72, and that difference was the essential basis for the Court's holding. Justice Stewart explicitly limited the rejection of the locality test to aviation tort cases. 496 F.2d 973, 978.

The petitioners contend as a basis for certiorari that there is a conflict in the Circuits as to the effect of *Executive Jet* on cases involving pleasure craft on navigable streams. We do not find such a conflict. In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. den.* — U.S. — (1974), the maritime tort involved a 15-foot outboard pleasure boat. *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973) also involved pleasure craft. *Crosson v. Vance*, 484 F.2d 840 (4th Cir.), which petitioners claim is in conflict with the Fifth, Eighth, and Ninth Circuits, is really not in conflict at all. That case involved injury to a waterskier and not to a passenger in a pleasure craft.

The court specifically avoided the issue posed by the latter situation. "For our present purposes, therefore, we need not speculate whether the Supreme Court's opinion in *Executive Jet Aviation* would foreclose resort to admiralty in any case involving the operation of small pleasure craft." 484 F.2d 840, 842.

In addition to the case law, there is powerful support for admiralty jurisdiction in the statutes of the United States, where a vessel is defined as follows: "The word vessel includes every description of watercraft or other artificial conveyance used, or capable of being used as a means of transportation on water." 1 U.S.C. § 3. In another statute it is stated that "the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river. . . ." 46 U.S.C. § 713. The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 940 provides in part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." Significantly, none of these statutes make a distinction between commercial and pleasure craft.

CONCLUSION

We therefore respectfully request that the petition for certiorari be denied.

Respectfully submitted

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Certificate of Service

I hereby certify that on this 20 day of August, 1974, three copies of the Brief of Respondent in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to James D. Storey and Gordon S. Rather, Jr., Wright, Lindsey & Jennings, 2200 Worthen Bank Building, Little Rock, Arkansas 72201, and George Pike, Jr., Smith, Williams, Friday, Eldredge & Clark, 1100 Boyle Building, Little Rock, Arkansas 72201, counsel for the Petitioners.

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